

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Roy Kendrick
AND	Orica New Zealand Limited (Respondent)
REPRESENTATIVES	Matthew Ward-Johnson, Counsel for Applicant Anthony Drake, Advocate for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	2 May 2006 24 May 2006
DATE OF DETERMINATION	10 August 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant submits he was unjustifiably dismissed from his employment with the respondent. He also submits he was unjustifiably suspended from his employment and suffered a disadvantage in this respect.

To remedy his alleged grievances he claims lost remuneration, compensation pursuant s.123 (1)(c)(1) and costs.

The respondent denies the claim and submits the applicant was justifiably dismissed for serious misconduct. The respondent also submits that Mr Kendrick's claim that of unjustified disadvantage (relating to his suspension) was not raised within 90 days.

Note: The Investigation into Mr Kendrick's claims occupied two days and included a site visit.

Background

Mr Kendrick was employed as a Bulk Liquids Transport Driver (BLT driver) working out of the company's premises in Mt Maunganui. He commenced employment with Orica on 4 August 2003.

Many of the products transported by the company are highly dangerous eg sulphuric acid and company policies/procedures demonstrate its commitment to the safe transportation of liquid chemicals and to the safety of its workforce, the public and the environment.

Employees are required to sign a Safety Health and Environment Charter annually and evidence was produced to show that on 17 November 2004 Mr Kendrick signed the company's Safety Health & Environment Charter following a discussion with his manager Nevin Dwyer. He expressly committed himself to the expectations set in the Charter including for instance, to maintain an awareness of SH & E in all tasks to follow all safety health and environmental requirements of the job.

The events that gave rise to Mr Kendrick's termination had their genesis in a report made by another BLT driver to the Senior Dispatch Planner (Steve Vaega) on the morning of 14 April 2005. He reported that the camlock fitting on the back compartment of the rear trailer of his tanker had been removed. Mr Vaega reported this to Mr Dwyer who viewed the matter seriously because the compartment contained class 8 corrosives. The fill line camlock fitting is a cap which fits on the fill line to a compartment (tank) on the trailer and when it is fitted and locked according to the appropriate procedure it acts to prevent spillage from the compartment when the product is in transit. If the camlock fitting is not in fitted and locked then there is a potential to cause serious harm to a person or the environment in the event of an incident resulting in spillage from that compartment.

Mr Dwyer interviewed Mr Barton who was adamant that the previous afternoon he had completed his filling and safety checks and washed the trailer down prior to leaving for the day. No notes were kept of this meeting.

Next Mr Dwyer viewed the available video surveillance footage of Mr Barton filling his tanker on the afternoon 13 April. Mr Dwyer viewed this footage with the three persons who were (at that time) working in the dispatch office, Mr Vaega, Mr Te Wheoro and Mr Laird (another BLT driver who was helping out in dispatch). It was Mr Dwyer's evidence that they had viewed the evidence they had a discussion and they agreed that on the afternoon of 13 April Mr Barton had checked and secured the tanker and washed it down in accordance with company policy. At the investigation meeting Mr Vaega, Mr Te Wheoro and Mr Laird resiled (in their written evidence) from Mr Dwyer's position in this regard. This video footage was not retained.

The same people also viewed the available video footage to see if there was any suspicious activity recorded on site on the night of 13 April. They identified a person in red with a torch on top of the tanker at 10.12pm that night. It was not possible to identify that person. In their written evidence Mr Vaega, Mr Te Wheoro and Mr Laird resiled from Mr Dwyer's evidence that they had all seen a person in red on top of the tanker with a torch that night and that they had agreed with Mr Dwyer on this point.

Next, Mr Dwyer had reception pull the records of gate activity on the night of 13 April. This showed that two people were on site around the time of the incident in question – Mr Kendrick and Mr Fadi Akawi and the video footage was reviewed again and it positively identified these two people on site at the time the person was seen on top of the tanker. That footage showed Mr Akawi wearing a white jacket with orange high-viz stripes and Mr Kendrick wearing red gortex overalls - the standard overalls worn by the company's BLT drivers.

Next Mr Dwyer met with Mr Akawi and Mr Kendrick to inquire of their movements and experiences on site that night. These interviews were recorded and a transcript made available to the Authority.

Mr Akawi is a 9-5 worker and Mr Dwyer met with him first. The purpose for the inquiry was explained to Mr Akawi. He advised that he had returned to the site after work that night because he had forgotten to take a sample from a wash test he was running and he needed that sample for

testing the following morning. He said he had met up with Mr Kendrick that night when he was on his way to the drum wash area to collect the sample. He advised he carried only a container to collect his sample and he did not carry a torch. He had not seen a person with a torch on top of a tanker or anything else of note and he denied getting onto the tanker himself. Mr Akawi's demeanour (described in the Summary of Incident report) was described as calm, obliging and helpful.

Mr Dwyer spoke to Mr Kendrick when he started his afternoon shift on the 14th. Mr Kendrick confirmed he was on site working as per his work instructions that night. The timing of his movements in and out was canvassed and it was explained there was a 2-minute time variation between the video surveillance record and the gate time record. Mr Kendrick confirmed he was wearing red overalls that night. Mr Kendrick denied getting onto the tanker. The record¹ shows that Mr Kendrick was described during the interview as 'somewhat agitated' and that he said he would leave immediately if wanted. He was also described as offering alternative explanations for the incident such as others getting into the site.

Following these interviews Mr Dwyer had the hard drive footage that showed someone in red with a torch on top of tanker copied to video and asked for that footage to be enhanced in an attempt to identify the person on top of the tanker. This took some time and on 10 May Mr Dwyer received the following email from the security company that undertook this task. That email said:

"Further to our recent telephone conversation in reference to the video recording we have given to you as a tape recording. I have spoken to our technician who viewed the recording to confirm his opinion only, there appeared to be 2 people in the film. One person had an orange fluro vest on, the other red overalls. They appeared to be talking to each other and then they disappeared. Then on top of the right hand corner of the picture there appeared to be a person in red on top of a tanker with a flash torch. The person with a flashlight could not be seen".

Reflecting on all the information available to him Mr Dwyer decided that Mr Kendrick had a case to answer and he commenced a disciplinary investigation. On 10 May Mr Kendrick was advised the respondent had completed its investigation and wished to hold a formal meeting with him. He was advised the company viewed the issue very seriously and was invited to a meeting to be held on 11 May. He was advised of his right to representation that it was important that he sought representation. He was suspended from his employment on that date.

On 11 May the company's allegations were formally put to Mr Kendrick and he was invited to attend a meeting the next day to address those allegations. The allegation put to Mr Kendrick that he was required to address was:

"That you were the person seen on Video Surveillance footage wearing Red overalls and responsible for the tampering of Trailer T90 on the evening of Wednesday 13th April 2005 at or about 2210 hours. It is alleged that you removed the fill line camlock fitting on the rear compartment of T90 that was loaded with Sulphuric Acid. This action could have resulted in a serious incident with the Sulphuric Acid being spilled from the fill line and discharged to the environment while the tanker was in transit".

Mr Kendrick was supplied with a Report summarizing the incident investigation to date and the gate card report.

¹ Summary of Incident report provided to Mr Kendrick in May 2004 at commencement of the disciplinary process.

Mr Kendrick met with the respondent on three dates following the receipt by him of the specific allegation against him i.e. on 12, 20 and 24 May. At these meetings Mr Kendrick was assisted firstly by Steve Vaega (12th) and then by his Union organiser, Phil Spanswick (20th). On 24 May Mr Kendrick was represented by Phil Spanswick and his lawyer, Matthew Ward-Johnson. At each of those meetings the video was viewed. At the meeting of 12 May Mr Dwyer explained the company's theory that Mr Kendrick had parked his truck next to the gate and had activated the gate opener while he was on top of the truck. Mr Kendrick asked questions and put forward explanations. Much attention was given to the timing issues. The record of the 12 May meeting shows that Mr Kendrick accepted it would have been possible for the person on the tanker to have also reached the Ballance site and to have been recorded at the Ballance weigh bridge at the time he was recorded at that point. The issues were thoroughly canvassed and records kept of the meetings. Those records show that after an adjournment in proceedings on the 24th Mr Dwyer communicated to Mr Kendrick that it had reached the conclusion that there had been serious misconduct on his part. Mr Kendrick was invited to comment prior to the company making a decision on his future. Mr Kendrick and his advisor both took advantage of that opportunity. Following another adjournment it was communicated to Mr Kendrick that the company had weighed a number of factors in coming to the decision it did including his employment history, but that given the seriousness of the situation it had decided to dismiss him.

Explanatory Notes to Background

Time Records

At the commencement of his investigation Mr Dwyer noted there was an approximate 2 minute variation in the times recorded between the video time recorder and that of the gate recorder with the video recorder recording ahead of the gate recorder. As part of his investigation Mr Dwyer undertook steps to reconcile the difference in times recorded by these separate recording devices. As I understand the evidence Mr Dwyer took note of the time recording at the gate recorder at one point in time and walked upstairs to the video recorder where he noted the time on that recorder. He then allowed for the time that it took to walk upstairs and arrived at a time difference of approximately 2 minutes. During the disciplinary process this was put to Mr Kendrick as being approximately 2 minutes, 10 seconds. The assessment of the timeframe during which Mr Kendrick was present on site and had the opportunity to tamper with the tanker in question relied on this time reconciliation undertaken by Mr Dwyer.

The time differential had been refined to 2 minutes 20 seconds by the time of the Investigation Meeting as a result of a subsequent comparison by Mr Dwyer of Fadi Akawi's appearance and disappearance together with the time on the gate card read out. Mr Kendrick's counsel submitted for him the time differential was more like 2 minutes 26 seconds.

Video recordings

The evidence reveals that the company has two cameras mounted in the tanker yard. These are not security surveillance cameras but are there to allow dispatch employees to monitor what is going on in the loading gantry so that traffic congestion in the yard is prevented. The cameras are on a 4 day loop and footage is overwritten. The hard drive footage was viewed on the 14th and the evidence was that that footage clearly showed a person in red with a torch on the top of the back trailer of the tanker in question on the night of the 14th. Mr Dwyer commissioned the downloading of this footage to video tape and asked that it be enhanced in an attempt to identify the person on top of the tanker. He did not request the download to video of footage of Brett Barton filling and checking his tanker on the afternoon of 13 April. Nor did he arrange to secure on video the footage of Mr Kendrick entering the site that night.

Attempts to identify the person on top of the tanker were unsuccessful and this was confirmed by Stuart Brown Security on 10 May albeit that letter did confirm the technician's opinion that the footage showed a person in red with a torch on the tanker in question.

There was only one video and it was for this reason Mr Kendrick was not supplied with a copy of the video for himself. That video was viewed at the meetings with Mr Kendrick on 12, 20 and 24 May. Unfortunately it appears that it is a feature of such videos that they deteriorate with repeated viewing. By the time the evidence was prepared for the Investigation Meeting² the image had deteriorated so badly that it was not possible to discern a person on the tanker at all. A moving light was clearly visible.

Position of the Parties

Applicant

Mr Kendrick denies tampering with any tanker in Orica's yard on the night of 13 April 2005. It is his position that the camlock fitting was not secured by Brett Barton during his fill and security checks on the afternoon of 13 April.

For the applicant it is submitted that given the procedural flaws in the investigation carried out by the respondent there was no justification for the decision reached; the respondent was left (as a result of its investigation) only with sufficient evidence to demonstrate suspicion at best and with the applicant denying involvement disciplinary action was unwarranted.

The principle procedural errors identified include:

- The respondent's failure to secure the retention of video footage from Camera 1 which showed Mr Kendrick entering the site at 9.21.21 on the evening of 13 April. This was critical because it would have enabled a precise assessment of the time difference between the video record and the gate card record. As a result of failing to retain that footage the respondent relied on an inaccurate measure to reconcile the difference between the time records.
- The respondent's failure to secure and make available to Mr Kendrick for viewing the video footage of Mr Barton completing his fill/security checks on the afternoon of 13 April.
- The failure to allow Mr Kendrick to view the hard drive footage of the person on the tanker and the subsequent failure to provide him with a copy of the video footage of the same incident.
- The respondent's failure to retain/make available to the applicant critical video footage significantly disadvantaged him in answering the allegations against him.
- The respondent did not identify the person on top of the tanker.
- The respondent did not identify any motive for the allegation the applicant had tampered with the tanker in question.

² It had by then been transferred to DVD and is not expected to further deteriorate.

- It was also submitted by and for Mr Kendrick that the matter was predetermined by 14 April because it was obvious at the meeting that day that he was being 'stitched up'. It was submitted he was given no prior notice of that meeting or the allegations he faced. Nor was he provided with an opportunity to obtain representation and an adjournment to allow this to happen.
- It was submitted there was an unreasonable delay by the employer between the meeting on 14 April and the 10 May when Mr Kendrick was advised he faced disciplinary proceedings
- No consideration was given to the explanations provided by Mr Kendrick at the meetings held with him.

In conclusion it was submitted that in the circumstances a fair and reasonable employer would not have reached the conclusion to terminate the applicant's employment. Extensive legal submissions were tabled to support this conclusion

It was also submitted by and for the applicant that he was not given the opportunity to discuss or comment on his suspension and his employment agreement does not provide for suspension. It was submitted the suspension was unjustified.

Respondent

It is the respondent's position that it came to an honest belief on the basis of the investigation it carried out that Mr Kendrick was guilty of serious misconduct. That conduct destroyed the company's trust in him.

In support of its position the company pointed to the fact it carried out a fair and proper investigation which consisted of some five meetings with Mr Kendrick. Mr Kendrick had been made aware of the allegation against him and the seriousness with which it was viewed. He was advised of his right to representation. Further, Mr Kendrick was given a full and fair opportunity to explain his actions and to respond to the allegations. The company undertook further investigations in response to information received from Mr Kendrick at the meetings held with him. Mr Kendrick's explanations were considered by the company with an open mind before any decision was reached. Legal submissions were made in support of the company's position.

Legal Considerations

The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

103A Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of **a fair and reasonable employer ...in all the circumstances ...at the time....**

The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions

(including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

At paragraph 144 the Court said in respect of the case before it:

“The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company’s policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her”.

The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

Discussion and Findings

Credibility

Credibility findings are particularly relevant to any determination on the matter before me.

Unfortunately, Mr Kendrick made a very poor showing under this head and the truth of the matter, in Mr Kendrick eyes, made a number of significant shifts as the case unfolded.

In his written brief Mr Kendrick stood in the same playing field as the respondent’s witness, Mr Dwyer i.e. that the video showed a person with a torch on top of a tanker on the night of 13 April 2005 (paras. 36, 41 and 56).

On the first day of the investigation Mr Kendrick advised the torch was not on the tanker but was over “by peroxide”. He accepted that the light, being a torch, had to have a person on the end of it. Then Mr Kendrick stated that he had never seen a person on a tanker but that he accepted there was a person on a tanker with a torch and wearing red clothing because Mr Dwyer had told him so. He said he asked Mr Dwyer about this and said, *“I can’t see him”*. Mr Kendrick said he had no reason to disbelieve what Mr Dwyer told him about this.

On the second day of the investigation meeting Mr Kendrick presented an entirely different scenario having been able to view the video in his own time. He maintained, firstly, that this was a different video than the one he was shown during the investigation because the “new” video showed the second axle of the tanker in question. It was then his position that the light seen on top of (and moving along the top of the tanker) was in fact the LED park lights of the tanker he was driving out that night as it passed behind the tanker in question.

Mr Kendrick ran a number of other contradictory stories to explain the events of the night in question. The above will suffice to show that his evidence was most unreliable.

The witnesses called to support Mr Kendrick were no better. The evidence given by Mr Vaega and Mr Te Wheoro challenged that of Mr Dwyer on the point that Brett Barton had filled his tanker, secured, washed and completed checks in accordance with company policy on the afternoon of 13

April. They also challenged Mr Dwyer's evidence that when they viewed the hard drive on 14 April that it showed a person wearing red on top of a tanker. Their evidence was internally inconsistent and they contradicted each other and the evidence of Mr Kendrick.

It is interesting in this respect to note the evidence of Mr Vaega given at the Investigation Meeting that Mr Barton told him (on reporting the camlock fitting was off) that he had found it off in the yard during pre departure checks and his evidence that Mr Barton had not in fact secured the camlock fitting on the afternoon of 13 April and that he had not agreed with Mr Dwyer that Mr Barton had done so. Despite this evidence, Mr Vaega (who acted as Mr Kendrick's support person at the meeting on 12 May) said none of this during the investigation process.

A Mr Laird was also present when Mr Dwyer first viewed the footage of the events of 13 April with Mr Vaega and Mr Te Wheoro. He was questioned on the second day of the investigation meeting. His evidence was evasive and contradictory on the key points as to whether or not Mr Barton completed the required safety checks and what was seen on top of the tanker that was tampered with.

Between them Mr Vaega, Mr Te Wheoro and Mr Laird confirmed almost all of Mr Kendrick's evidence (which itself changed) and that of the respondent. Along with Mr Kendrick I find these witnesses were unreliable.

The evidence of Mr Dwyer was on the other hand consistent and it accorded closely with the supporting documentation presented.

I also found Brett Barton to be a credible witness.

As a result where there is a dispute in the evidence it is the evidence of the respondent's witnesses that I prefer.

Findings

In arriving at a determination in this matter I have considered the evidence having regard to my credibility findings, the submissions of the parties and relevant case law.

In a number of respects the evidence received at the Investigation meeting differs from the information gathered during the investigation carried out by the employer. In arriving at a determination in this matter I am required to assess whether the employer's actions assessed objectively were what a fair and reasonable employer would have done in the circumstances at the time. It is critical to my assessment that I have regard to what was done by the employer *at the time* and what information was known to the employer *at the time* the decision to dismiss Mr Kendrick was made.

On the evidence, I find that the employer carried out a fair and thorough investigation and at the time of concluding that investigation the following facts were at hand. (Relevant findings as to the fairness of the process adopted are included).

- Mr Barton had been interviewed and he confirmed he carried out his security checks and washed down his tanker in accordance with company policies. This was confirmed on checking the video footage of Mr Barton's actions that afternoon. The fact there was no exothermic reaction³ (agreed by all witnesses that viewed the video footage both at the time

³ If water and sulphuric acid mix, this results in a violent reaction resulting in a lot of steam which would have been seen by those viewing the camera footage.

and at the Investigation) when the tanker was washed down with a high pressure hose also provided confirmation the camlock lid was properly secured that afternoon.

- Mr Dwyer had checked gate records to determine who was present on site over the evening of 13 April. That record showed Mr Kendrick and Mr Akawi were present that evening. The video footage confirmed their presence on site and showed what they were wearing and generally supported their later explanations about their movements in relation to the tasks they undertook that night.
- The video footage also showed a person with a torch on top of the tanker in question dressed in red. That tanker was parked in Bay 4.
- Mr Dwyer had taken steps to reconcile the time records. The steps taken allowed for a reasonably accurate reconciliation of the video record against the gate time record.
- Mr Dwyer had undertaken preliminary discussions with Mr Akawi and then with Mr Kendrick. The purpose of his inquiry of them was explained and their movements discussed. I find the discussion with Mr Kendrick was not in the nature of a disciplinary inquiry. It was a preliminary inquiry only and it is clear on the record of that meeting that no blame was attached to Mr Kendrick. The employer was careful to explain the need to inquire into the events of that night and the fact that Mr Akawi and Mr Kendrick were on site at the time in question necessitated making general inquiries of them as to their movements, what they wore that night and what they may have seen that could assist the respondent's inquiry. There is nothing on the record of that meeting that would support Mr Kendrick's assertion that he was being 'stitched up' and it would have been premature and unfair to Mr Kendrick at that stage of the investigation had he been subjected to a formal disciplinary investigation with all the formality and cautions that entails. There was simply no basis for commencing disciplinary proceedings against Mr Keating at this time and I find there was no unfairness to Mr Kendrick arising out of this discussion.
- Mr Dwyer had the video footage of the person on the tanker downloaded to video to preserve it. He requested an enhancement to see if it was possible to identify the person on the tanker. That took until 10 May. There is no basis for Mr Kendrick to claim that there was undue delay between the inquiries the respondent made of him on 14 April and the disciplinary process which commenced on 10 May. That delay was occasioned by the need to preserve the video footage and attempt to enhance it. The results of that exercise were not known until 10 May and it is entirely appropriate that Mr Dwyer waited till the report on that exercise was available before commencing disciplinary proceedings against Mr Kendrick. No unfairness to Mr Kendrick occurred on this score.
- Mr Kendrick appropriately weighed the information before him before instituting disciplinary proceedings against Mr Kendrick. I find he had reasonable grounds to suspect misconduct on Mr Kendrick's part at that time. The allegation was squarely put to Mr Kendrick together with a statement of the seriousness with which it was viewed and the importance of his obtaining representation. Time was allowed for him to obtain representation. Mr Kendrick was provided with a Summary of Incident report which set out the results of the employer's investigation so far. He had the opportunity to consider this prior to the first opportunity given for him to provide any explanation/information he wished to contribute. Subsequently he was provided with a copy of the gate card read out. Mr Kendrick was not provided with a copy of the video because there was only one copy and inquiries had revealed that further copying would promote deterioration in the footage.

- There were three meetings with Mr Kendrick. He was represented at each of these meetings. The video was viewed at each of these meetings and I accept the evidence that it showed a person wearing red with a torch on the rear of the tanker parked at Bay 4. I also find that Mr Kendrick saw and accepted this at the time. At the meeting of 12 May Mr Dwyer explained the company's theory that Mr Kendrick had parked his truck next to the gate and had activated the gate opener while he was on top of the truck. Much attention was given to the timing issues and the time variance between the two recorders was put by Mr Dwyer at that meeting at approximately 2 minutes and 10 seconds. Mr Kendrick asked questions and put forward explanations including the explanation that it would not have been possible for him to have been on the tanker at the time in question and to have had time to get to the Ballance in time to weigh in there. He produced the weigh bridge docket from Ballance. The record of the 12 May meeting shows that Mr Kendrick later accepted it would have been possible for the person on the tanker to have also reached the Ballance site and to have been recorded at the Ballance weigh bridge at the time he was recorded at that point. The issues were thoroughly canvassed and records kept of the meetings.
- Following these meetings Mr Dwyer followed up issues raised and met with others including those who volunteered support for Mr Kendrick. Mr Akawi was interviewed again about what he had seen that night and whether he would have been in a position to see anything. An independent check was made of the time it would take to get from the Orica yard to the Ballance weigh bridge. And as it had been brought to Mr Dwyer's attention that Mr Barton had discovered the camlock fitting off the rear compartment when he arrived at his first stop on the morning of the 14th and not during his pre start check before he left the yard Mr Dwyer checked this. It was a serious matter in itself because if it was true then it meant that Mr Barton had not completed his pre departure safety checks. Mr Kendrick's submissions on this point were borne out. Much was made of this at the hearing. It is unfortunate that this was not uncovered in the original interview with Mr Barton. Once the correct situation had been disclosed this became a disciplinary issue between the company and Mr Barton and he was disciplined. However, Mr Dwyer determined it did not influence its inquiry into the allegation that Mr Kendrick had tampered with the camlock fitting that the respondent had satisfied itself was properly fitted and locked down on the afternoon of 13 April. I agree that Mr Barton's failure to undertake a pre-departure check of the top of his tanker on the 14th (which would have revealed the camlock fitting had been removed) was blameworthy in itself. He was disciplined. I find, however, this is irrelevant to the inquiry into Mr Kendrick's actions that night.

The evidence discloses that at the meeting on 24 May the respondent took an adjournment and weighed the information that had been gathered during the investigation which showed:

- The rear camlock fitting had been secured on the afternoon of 13 April and was found off the next morning.
- Later that night person in red was seen on the rear of the tanker in question. That person had a torch. Mr Dwyer excluded the possibility that the person in red had not been responsible for the tampering.
- Mr Kendrick had been on site and in close vicinity to the tanker when it was tampered with. He was wearing red clothing.
- Mr Kendrick had agreed it was possible for the person on the tanker to have left the tanker and to have got to Ballance in time to weigh in there at the time he weighed in. He had agreed the times were correct.
- While Mr Akawi had been on site at the time he was not wearing red clothing and was not in the vicinity of the tanker when it was tampered with. His explanation for being on site was credible and it had checked out with his supervisor. It was accepted Mr Akawi had not seen

anything because his line of sight to the tanker yard was obstructed by the wall of the Hydrogen Peroxide facility.

- There was no evidence of a break in or break out and Mr Kendrick had confirmed there were no cars in the immediate vicinity other than Mr Akawi's. Mr Kendrick had also confirmed he saw no one enter or leave when he entered and exited the site.
- The site is in a remote industrial area and Mr Dwyer considered it highly improbable that someone else would have entered the site to tamper with the camlock fitting.

I am also satisfied on the evidence that Mr Dwyer gave careful consideration to Mr Kendrick's explanations. This is evidenced in part by the additional inquiries that were carried out by Mr Dwyer following the meetings held with Mr Kendrick. The evidence also disclosed consideration of all of Mr Kendrick's submissions e.g. his statement he would not have needed a torch to tamper with the camlock fitting⁴. The evidence shows Mr Dwyer considered this but decided the valance around the top of the trailer would have obstructed the available light making the use of a torch necessary.

In the event Mr Dwyer arrived at an honest belief that Mr Kendrick was responsible for the tampering and that this amounted to serious misconduct on his part. I find that this was a conclusion open to the respondent based on the investigation undertaken which was thorough and fair. It measures up to the standard required of a fair and reasonable employer in the circumstances at the time. Having arrived at this position the respondent put its conclusion to Mr Kendrick and allowed him the opportunity to comment before any decision was taken as to the employer's proposed response. This too was the action of a fair and reasonable employer and in arriving at the decision to dismiss Mr Kendrick the seriousness of the misconduct-given the extreme hazard posed by the contents of the tanker tampered with - outweighed any positive features of Mr Kendrick's employment history. The decision to dismiss Mr Kendrick was open to the respondent and is the action that would have been taken by fair and reasonable employers in the same circumstances.

On a final note I accept that the process would have been enhanced by retention of the video footage that was allowed to be overwritten. The process would have been more transparent. The failure to retain this footage is not however fatal to a finding the dismissal was justified. This is because I am satisfied the employer satisfied itself (by interviewing Mr Barton) that he had indeed locked the camlock fitting down on the night of 13 April and in addition had viewed footage confirming it. That was itself confirmed in discussion with the other viewers present and the absence of an exothermic reaction was noted in that discussion. The test to reconcile the time differences between the two recorders was simple but effective and the time difference put to Mr Kendrick at the meetings between 12 & 24 May was approximately 2 minutes 10 seconds. The evidence shows on this reconciliation that Mr Kendrick was on site when the person with the light was seen on the tanker albeit the gate was activated during the time the person was on the tanker. Lastly on this point it is clear that the video evidence available to the employer was not the only evidence relied upon by the employer in arriving at the decision to dismiss Mr Kendrick. It was a combination of factors that together added up to point – on the balance of probabilities- to serious misconduct on his part.

Neither is it fatal to the employer's decision that it did not establish a motive. That matter was investigated but no motive uncovered. Neither was the employer required to positively identify the person seen on top of the tanker. On this point I note, the respondent was not required to show that the conduct complained of did occur – only that following a fair and thorough inquiry that it arrived at the honest belief that the misconduct had occurred.

⁴ Mr Kendrick contradicted his evidence on this point in his oral evidence when he said he would have needed a torch to see on tankers from Bay 4 and beyond.

Determination

Dismissal

Mr Kendrick's dismissal was justified. He does not have a personal grievance and is not entitled to remedies.

Suspension

On the evidence before me⁵, Mr Kendrick did not raise a grievance relating to his suspension within 90 days pursuant to the provisions of s.114 (1) and he has not sought leave to raise his grievance out of time.

I make no findings, therefore, in respect of this matter and note that had I given it consideration and found that Mr Kendrick had suffered a disadvantage grievance in relation to his suspension it is unlikely, given all the circumstances and Mr Kendrick's contribution to the outcomes that befell him, that I would have awarded remedies

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority

⁵ Letter raising personal grievance dated 22 June 2005.